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No. 02-925

In the Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, ET AL.

v.

NAVREET NANDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 303 F.3d 817. The opinion of the district court (Pet. App. 31a-42a) is reported at 219 F. Supp. 2d 911.

JURISDICTION

The court of appeals entered its judgment on September 17, 2002. The petition for a writ of certiorari was filed on December 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). As originally enacted, Title VII applied only to private employers. In 1972, Congress amended the statute to include state and local "governments [and] governmental agencies" within its definition of "person" and "employer." 42 U.S.C. 2000e(a) and (b). In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held that, under the 1972 amendments, congressional intent to abrogate the States' Eleventh Amendment immunity and "congressional authorization to sue the State as employer is clearly present." *Id.* at 452 (citation and internal quotation marks omitted).

2. Respondent Navreet Nanda was employed by the University of Illinois as an assistant professor of microbiology. Pet. App. 1a-2a. In 1998, the University notified Nanda that her employment would terminate on August 31, 1999. *Id.* at 2a. After exhausting the University's internal grievance procedures, Nanda filed suit against petitioners (the University's Board of Trustees and various University officials sued in their official capacities) in federal district court, alleging, *inter alia*, that their termination of her employment was the result of intentional discrimination on the bases of her race, sex, and national origin, in violation of Title VII. The complaint sought injunctive relief and damages. *Id.* at 2a-3a.

Petitioners moved to dismiss on the ground that they were immune from suit under the Eleventh Amendment. Pet. App. 3a. The district court denied that motion, holding that Title VII validly abrogates the States' Eleventh Amendment immunity from suit. *Id.* at 32a-37a.

3. The court of appeals affirmed. Pet. App. 1a-30a. The court reasoned that Title VII's prohibition of disparate treatment by state employers on the bases of race, sex, and national origin tracks the requirements of the Equal Protection Clause, *id.* at 23a-25a, and thus that "Title VII enforces the Fourteenth Amendment without altering its meaning," *id.* at 26a (internal quotation marks omitted). The court of appeals also concluded that "Congress was responding to a pattern of discrimination by the States." *Id.* at 27a. The court accordingly ruled that, in extending Title VII to state employers, Congress properly acted pursuant to its Section 5 power to enforce the Equal Protection Clause and validly abrogated the States' Eleventh Amendment immunity. *Id.* at 28a.

ARGUMENT

Because the court of appeals' decision is correct and consistent with the rulings of other circuits and of this Court, further review is not warranted.

1. Petitioners argue (Pet. 8) that this Court should grant review to address a "lower-court split over whether the 1972 Amendments to Title VII * * * are appropriate enforcement legislation under Section 5 of the Fourteenth Amendment" (capitalization omitted). There is no such split in the courts of appeals. Every court of appeals to consider the question has concluded, like the court of appeals here, that Congress's extension of Title VII to state employers reflects a proper

exercise of the Section 5 power and, thereby, validly abrogates the States' Eleventh Amendment immunity. See *Okruhlik* v. *University of Ark.*, 255 F.3d 615, 624-627 (8th Cir. 2001); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.), cert. denied, 531 U.S. 1052 (2000); *Holman* v. *Indiana*, 211 F.3d 399, 402 n.2 (7th Cir.), cert. denied, 531 U.S. 880 (2000); *Jones* v. *WMATA*, 205 F.3d 428, 434 (D.C. Cir. 2000); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1321-1322 (11th Cir. 1999); *Ussery* v. *Louisiana*, 150 F.3d 431, 434-435 (5th Cir. 1998), petition for cert. dismissed, 526 U.S. 1013 (1999); *Cerrato* v. *San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 975-976 (9th Cir. 1994).

While petitioners assert (Pet. 11-12) that review is necessary because the case "concerns the proper respect and dignity due the States," this case no more implicates that interest than the other Title VII abrogation case in which the Court recently denied certiorari. See *Maitland* v. *University of Minn.*, 260 F.3d 959 (8th Cir. 2001), cert. denied, 535 U.S. 929 (2002).

Petitioners' reliance (Pet. 8-10) on *Laro* v. *New Hampshire*, 259 F.3d 1 (1st Cir. 2001), *Lizzi* v. *Alexander*, 255 F.3d 128 (4th Cir. 2001), cert. denied, 534 U.S. 1081 (2002), *Chittister* v. *Department of Community and Economic Development*, 226 F.3d 223, 225 (3d Cir. 2000), and *Kazmier* v. *Widmann*, 225 F.3d 519 (5th Cir. 2000), is equally misplaced. None of those decisions addressed the constitutionality of Title VII's abrogation of Eleventh Amendment immunity. They all involved Congress's power to abrogate Eleventh Amendment immunity under a different law—the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.* Moreover, *Laro*, *Lizzi*, and *Chittister* all involved the Family and Medical Leave Act's individual

sick leave provision, 29 U.S.C. 2612(a)(1)(D), a provision that the United States no longer defends as legislation designed to combat gender discrimination. See *Laro*, 259 F.3d at 4 & n.1; *Lizzi*, 255 F.3d at 131; *Chittister*, 226 F.3d at 225; see also U.S. Br. in Opp. at 8 n.2, *Nevada Dep't of Human Res.* v. *Hibbs*, No. 01-1368 (argued Jan. 15, 2003).[1] Those cases simply have no bearing on the question of Congress's authority to enact Section 5 legislation, such as Title VII, targeted at racial and gender discrimination.

2. Contrary to petitioners' argument (Pet. 12-27), the court of appeals' decision is correct and consistent with decisions of this Court.

a. Petitioners do not dispute that "Congress has 'unequivocally expresse[d] its intent to abrogate the [States'] immunity.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 635 (1999). Nor could they. See *Quern* v. *Jordan*, 440 U.S. 332, 344 (1979); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1976).

Furthermore, in extending Title VII to state employers, Congress properly exercised its Section 5 power to enforce the Equal Protection Clause. The Equal Protection Clause prohibits intentional discrimination by state governments on the bases of race, *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997), sex, *United States* v. *Virginia*, 518 U.S. 515, 523 (1996), and national origin, *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). Those prohibitions extend to discrimination in government employment. *Davis* v. *Passman*, 442

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[1] This Court is currently considering the question whether the family leave provisions of the Family and Medical Leave Act are a valid exercise of Congress's Section 5 power. See *Nevada Dep't of Human Res.* v. *Hibbs*, No. 01-1368.

U.S. 228 (1979); *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 309-310 & n.15 (1977).

The provision of Title VII at issue here tracks that constitutional prohibition by making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). As this Court has recognized on numerous occasions, that provision prohibits intentional discrimination by state employers on the bases of race, sex, and national origin. See *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 985-986 (1988); *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983).

Congress acted, moreover, against the backdrop of this Nation's "undeniable" "history of racial discrimination," *McCleskey* v. *Kemp*, 481 U.S. 279, 298 n.20 (1987), and its "long and unfortunate history of sex discrimination," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). Employment discrimination by state actors is part of that history. See, *e.g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 n.10 (1982).

b. Petitioners argue (Pet. 13-18) that the court of appeals failed to proceed from the premise that States presumptively act constitutionally. That presumption, however, has no application when state action differentiates between employees based on their race, sex, or national origin. Such actions are subject to heightened scrutiny by this Court—a mode of analysis that presumes the differential treatment is unconstitutional unless the State demonstrates that it advances a com-

pelling or exceedingly persuasive governmental interest and is narrowly tailored or substantially related to that interest. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 105 (2001) (per curiam); *Virginia*, 518 U.S. at 531. The standards of proof in disparate treatment cases under Title VII parallel that constitutional model. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Petitioners also contend (Pet. 18-27) that Congress compiled an insufficiently exhaustive legislative history to support the conclusion that States have engaged in a long pattern of discrimination on the bases of race and gender. That argument is meritless for two independent reasons. First, Article I of the Constitution identifies the constitutional preconditions to Congress's exercise of its legislative authority. Nothing in that Article requires the creation or compilation of legislative histories. Nor do this Court's cases. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) ("[L]ack of support" in the legislative record "is not determinative of the § 5 inquiry."); *Florida Prepaid*, 527 U.S. at 646 ("[L]ack of support in the legislative record is not determinative."); *City of Boerne* v. *Flores*, 521 U.S. 507, 531 (1997) (validity of Section 5 legislation is not determined by "the state of the legislative record").[2]

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[2] See also *United States* v. *Morrison*, 529 U.S. 598, 612 (2000); *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 213 (1997) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."); *United States* v. *Lopez*, 514 U.S. 549, 562 (1995) ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) ("Congress is not required to build a record in the legislative history to defend its policy choices.").

Second, this Nation's long history of discrimination on the bases of race, gender, and national origin is well documented in the decisions of this Court, and indeed forms the very predicate for this Court's application of heightened scrutiny to state action. See, *e.g.*, *Virginia*, 518 U.S. at 531 (state action "denying rights or opportunities based on sex" is recorded in "volumes of history"); *McCleskey*, *supra*; *Oyama* v. *California*, 332 U.S. 633, 646 (1948) ("[A]s a general rule, [d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.") (internal quotation marks omitted). Nothing in Section 5 compels Congress to belabor the obvious in legislative history that it has no constitutional obligation to create in the first place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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